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No. 87-472

In The

Supreme Court of the United States

October Term, 1987

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N. V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and THE FIDELITY STANDARD LIFE INSURANCE COMPANY,

Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Hawaii Intermediate Court of Appeals correctly affirmed the trial court's dismissal of Petitioners' complaint for lack of prosecution, pursuant to Hawaii R. Civ. P. 41(b), where, on the morning that jury trial was to begin, the Petitioners had left the jurisdiction and Petitioners' attorney left the courtroom and deliberately refused to comply with the trial court's order to proceed with their case?

2. Whether the Hawaii Intermediate Court of Appeals correctly declined to review the trial court's pretrial orders where to do so would violate the State of Hawaii's policies (1) against piecemeal appeals and (2) in favor of requiring an appellant to present an adequate record for the purposes of appellate review?

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IV.

STATEMENT OF THE CASE

This Petition arises out of an action which was dismissed with prejudice for failure to prosecute when the Petitioners failed to appear for trial, and Petitioners' attorney, at the Petitioners' instruction, ignored the trial court's order to proceed, and walked out of the courtroom on the morning of trial.

The underlying action began with the purchase and sale of a luxury home in Honolulu, Hawaii for $1.35 million in June, 1981. About six months after the Petitioners (purchasers of the house and plaintiffs below), had executed an agreement of sale with Respondent Howard Lane (seller of the house and defendant below),[1] a heavy rainstorm occurred. Petitioners alleged that during the storm water leaked through portions of the walls of the house. Petitioners stopped payments under the agreement of sale in January of 1982. In March of 1982, Petitioners sued for specific performance or rescission of the agreement of sale, fraud, and for damages.

During the dispute and shortly before the Complaint was filed, Petitioner Leon Richardson sent a telex to Respondents accusing them of, *inter alia*, criminal fraud, and threatening to report Respondents to various public officials, including the U.S. Department of Justice, the Australian Embassy in Washington, D.C., and the Lieutenant Governor of the State of Hawaii. Following the

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[1] Respondents Willis Sinsabaugh and Waterfront Properties, Inc. were the seller's brokers. Waterfront Properties, Inc. has no parent, subsidiary, or affiliate companies; *see* Supreme Court Rule 28.1.

filing of the suit, Respondents counterclaimed for enforcement or cancellation of the agreement of sale and for damages for libel and defamation based upon this telex.

The trial on the claims involved in the complaint, counterclaim and crossclaims of the other parties was set for the week of January 21, 1985. As the Hawaii Intermediate Court of Appeals ("ICA") correctly states in its Opinion, the matter had, by then, degenerated into a battle over discovery proceedings. *Richardson v. Lane*, No. 11353, slip op. at 2 (Hawaii Intermediate Court of Appeals, April 3, 1987, as amended) ("Opinion"), reprinted in Petitioners' Appendix ("P.A.") at A-1 through A-11.

On January 16, 1985, Respondent Lane filed a Motion to Dismiss and for Sanctions pursuant to Hawaii R. Civ. P. 37 on the grounds that Petitioners had violated a Stipulation and Order issued by the Hawaii Circuit Court's Motions Judge on October 2, 1984 regarding the taking of depositions of expert witnesses. The motion was predicated on the Petitioners' willful violation of that discovery order in refusing to allow the Respondents to complete the depositions of two of Petitioners' expert witnesses and to commence the deposition of a third expert witness. Petitioners opposed the motion.

The motion was heard by the trial judge on January 17, 1985. After hearing argument from all parties and inquiring into the facts and circumstances surrounding the Motion, the court ruled that the Petitioners had failed to comply with the discovery order, and ordered that the

testimony of three expert witnesses be excluded from trial. P.A. "F".

Notwithstanding Petitioners' rhetoric to the contrary, this order did not deprive Petitioners of any constitutional right to jury trial or to due process. As shown by Petitioners' own Supplemental Pretrial Statement filed on January 17, 1985, Petitioners had listed over 27 fact witnesses and 15 expert witnesses. Respondents' Appendix ("R.A.") at B-2, B-3. Even without the three excluded expert witnesses, Petitioners had other engineering and architect witnesses available to testify. Moreover, Petitioners' claims were based on rescission, misrepresentation, specific performance and fraud, and expert witnesses were not necessary under Hawaii law to present a *prima facie* case.

Also on January 17, 1985, Lane filed a Motion to Dismiss on the grounds that Petitioners had failed to comply with a previous order orally made on December 5, 1984, and entered by the Circuit Court Motions Judge on January 14, 1985, requiring Petitioners to deposit forthwith, as security, "all payments due under the Agreement of Sale" which is the subject of this action ("Security Order"). The Security Order did not specify the exact amount to be deposited; however, by the end of 1984 the entire principal balance of the agreement of sale had become due and Respondent Lane was owed nearly $1,000,000, including interest and late fees. *See*, e.g., P.A. at L-21, lines 11-15.

This motion was heard by the Trial Judge on January 18, 1985. Petitioners orally opposed the motion. After argument, the trial court denied the motion to dis-

miss, but amended the order to specify that the amount to be deposited was $743,750.[2] The court further ruled that the sum was to be deposited by 9:30 a.m. on January 21, 1985. P.A. "G". The court, however, expressly refused to threaten any sanction for failure to comply with this ruling or with the Security Order. In fact, no sanctions were threatened or imposed against Petitioners for failure to comply with either order. *See* P.A. p. L-24, lines 13-16, and at M-9, lines 10-24.

On January 21, 1985 Petitioners did not appear for trial. Instead, Petitioners, through their attorney, submitted an "Affidavit of Plaintiff Leon D. Richardson Disqualifying the Honorable Edwin Y. Sasaki Pursuant To Section 601-7(b), H.R.S." in an attempt to stop this trial. *See* R.A. at "A". The affidavit, in substance, stated that the trial court was biased and partial based on the court's rulings involving the exclusion of three expert witnesses and the modifying of the order requiring sums to be deposited into court. In the affidavit, however, Petitioners acknowledged that they knew they could appeal those rulings. After considering the affidavit, the trial court declined to disqualify itself. *See e.g.* P.A. at M-5.

The court then called the case for trial. Respondents and their attorneys were present. The role of the jury *venire* was taken. At a bench conference following the roll call, Petitioners' attorney requested permission to take an interlocutory appeal, which was denied. P.A. at M-5.

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[2] Petitioners claimed that there was an oral modification of the payment terms. In specifying the amount, Judge Sasaki in fact gave the Petitioners the benefit of this doubt. *See*, P.A. at L-21, lines 7-10, 24-25.

Dr. Dubin then obstinately resisted all orders that he proceed:

> THE COURT: All right. Your objection is noted. We'll proceed with the trial.
>
> MR. DUBIN: On that basis, I will say that we do not waive our right to trial by jury.
>
> THE COURT: The jury panel is sitting right there.
>
> MR. DUBIN: *I'm instructed not to participate in these proceedings.*
>
> THE COURT: The panel is sitting right there. Mr. Dubin, and what you have been instructed to do, I don't know. We will proceed with the calling of the twelve.
>
> MR. DUBIN: I'm telling the Court that it is my legal opinion that I cannot participate in this proceeding and still protect the rights of my client. I would ask the Court, under these circumstances, to grant a continuance of one day so that I could at least have the opportunity to present a legal memorandum to the Court showing that the legal issues in this case, the trial judge does make decisions.
>
> THE COURT: Mr. Dubin, you knew from last week what was going to happen today. You've had all weekend to work on it. I don't see where one more day would help. We will proceed.
>
> * * *
>
> (End of bench conference).
>
> (Mr. Dubin left the courtroom).

See P.A. at M-9, 10 (emphasis added.)

Faced with the absence of the Petitioners and Petitioners' attorney, the court dismissed the complaint for lack of prosecution and entered a default against Petition-

ers as to the counterclaim. The court then dismissed the jury *venire*. Following entry of judgment, Petitioners appealed to the Hawaii Intermediate Court of Appeals.

On April 3, 1987, the ICA rendered its opinion affirming the trial court's dismissal of the Complaint with Prejudice and the entry of default. *Richardson v. Lane*, No. 11353, slip op., as amended. The ICA further specifically held that it would not review any of the alleged errors that occurred prior to the dismissal of the Complaint, as it had no record upon which to evaluate the effect of the orders and that to do so would violate Hawaii's policy against piecemeal appeals.[3] Opinion, at 7.

On May 4, 1987, Petitioners filed an Application for Writ of Certiorari to Review the Opinion filed April 3, 1987, amended by order filed April 22, 1987 upon reconsideration. By Order dated May 8, 1987, the Hawaii Supreme Court denied Petitioners' Application for Writ of Certiorari.

On May 19, 1987, the ICA filed a Notice of Entry of Judgment on Appeal and Judgment on Appeal.

On August 17, 1987, Petitioners mailed the subject Petition for Writ of Certiorari to the United States Supreme Court. The Petition was filed on September 21, 1987.

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[3] The original opinion of the Hawaii Intermediate Court of Appeals affirmed the trial court's granting of attorneys' fees and costs to Respondents Sinsabaugh and Waterfront Properties. By order dated April 22, 1987, the Court partially amended its opinion and reversed the trial court's granting of such fees and costs.

V.

ARGUMENT

A. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE.

The principal and dispositive issue presented to the ICA below is set forth in the first sentence of Section I of the Opinion:

> When plaintiffs' counsel informed the trial court that plaintiffs had instructed him not to participate further in the proceedings and left the courtroom, plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed the complaint under Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980), for lack of prosecution. [Footnote omitted.] (Opinion at 4-5, Petitioner's Appendix A-5, A-6).

In deciding this issue, the ICA did not depart from any principles set forth in the decisions of this Court. See, for example, *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

Petitioners' refusal to proceed on the morning of trial, in direct violation of the trial court's order to do so, and with full knowledge that they had an appropriate remedy by way of appeal, was a deliberate waiver of their claims and their right to a review of the pretrial orders. Petitioners fail to present this issue directly for review by this Court. *See* Petitioners' Questions Presented. Therefore, this Court should not consider whether the dismissal of the Complaint was improper. Supreme Court

Rule 21.1(a); *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972).

This case presents no special and important reasons for consideration or review by this Court. Supreme Court Rule 17. At best, the actions by Petitioners in this case are unlikely to be repeated with any regularity. Notwithstanding the uniqueness of the facts, the case presents no new issue of law or application of law which would justify granting certiorari.

The Opinion by the ICA is entirely consistent with this Court's rulings, with the rulings of other Federal Courts of Appeals, and with the rulings of other state courts of last resort. The rules of law applied in the ICA opinion neither depart from accepted judicial principles, nor decide important public questions that warrant review by this Court. *See,* sections V(C), V(D) and V(E), *infra.*

This case offers no opportunity for this Court to settle any important question of Fourteenth Amendment[4] due process principles which have not been heretofore settled by this Court.

B. CERTIORARI SHOULD NOT BE GRANTED AS THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS WHICH SUPPORT THE DECISION OF THE HAWAII INTERMEDIATE COURT OF APPEALS.

After deciding that the trial court had properly dismissed the complaint and entered a default against the Petitioners, the ICA went on to hold that:

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[4] U.S. Const. amend. XIV.

> By refusing to proceed with the trial, plaintiffs left the trial court no choice but to dismiss their complaint. Plaintiffs' argument that the preclusion order was destructive of their case carries no weight against the record here. There is no way we can evaluate the effect of the Order because Plaintiffs' refusal to proceed has left us without a record of the remainder of their proof. Finally . . . we will not discuss alleged errors that occurred prior to the dismissal of the complaint, as to do so would be contrary to this jurisdiction's policy against piecemeal appeals. *Doe V v. Roe V*, 5 Hawaii App. 610, 704 P.2d 940 (1985) (footnote omitted).
>
> (Opinion at 7, Petitioner's Appendix at A-8).

The ICA's decision not to go beyond the dismissal below is fully supported by two important state interests in proper trial procedure. First, by voluntarily defaulting and allowing judgment to be taken against them, Petitioners improperly attempted to circumvent the state's recognized policy against piecemeal appeals. *Doe V v. Roe V*, 5 Hawaii App. 610, 704 P.2d 940 (1985); *Powers v. Ellis*, 55 Hawaii 414 (1971); *Catlin v. United States*, 324 U.S. 229 (1945). Although not directly at issue here, the Hawaii legislature has expressly stated that a trial judge's denial of a request for leave to take an interlocutory appeal is unreviewable by any court. Section 641-1(b), Hawaii Rev. Stat.

Second, Hawaii appellate procedure imposes the duty on the appellant to marshal an adequate record for the purposes of review on appeal. *Union Bldg. Material Corp. v. Kakaako Corp.*, 5 Hawaii App. 146, 152-153, 682 P.2d 82, 88 (1984); Haw. R. App. Proc. 10(b) and 11(a). This duty applies not only to the presentation of an adequate

existing record, but also to the creation of a meaningful record in the trial court. *See,* Hawaii R. Evid. 103(a)(2). By refusing to proceed with any proof, and by failing to make an offer of proof, Petitioners deprived the appellate court of any record of the effect of the pretrial orders. This prevented any useful review. *See* Opinion at p.7; P.A. at A-8. Moreover, the Petitioners' list of witnesses, R.A. B-1, B-2, submitted four days before trial, shows that proceeding to trial would not have been a futile act.

The alleged constitutional errors in the pretrial rulings had not been properly presented to the ICA, and review was properly precluded by legitimate and recognized state policies. The ICA's ruling being supported by these policies, and there being no improper evasion of the constitutional issues by the ICA, this Court should also refuse to review them. *See, Wolfe v. North Carolina,* 364 U.S. 177 (1959).

C. THE PRETRIAL ORDERS WERE NEITHER DISPOSITIVE OF THE CASE NOR FINAL FOR THE PURPOSE OF APPEAL.

In an effort to evade the effect of their voluntary default at trial, Petitioners argue that the pretrial orders were somehow dispositive of their case. Petitioners also claim that the doctrine against piecemeal appeals has "lost favor." *See* Petitioners' Brief at 31-33, citing *Forgay v. Conrad,* 47 U.S. (6 How.) 201 (1848) and *Anderson v. Allstate Insurance,* 630 F.2d 677 (9th Cir. 1980). Petitioners' contentions are unsupported. *Forgay* involved a decree which adjudicated rights to, and possession of certain property. The only issue left for adjudication was an adjusting of accounts between the parties. *Ander-*

son involved in a case in which finality had been achieved and "there was nothing left to be decided." *Anderson*, 630 F.2d at 681.

This Court's recent cases have consistently upheld the policy against appeals of an interlocutory order, especially where the order is not dispositive of the case and is fully reviewable on appeal from a subsequent final judgment. *Richardson-Merrell, Inc. v. Keller*, 472 U.S. 424, 430-31 (1985); *United States v. Hollywood Motor Car Company, Inc.*, 458 U.S. 263 (1982); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

Here, contrary to Petitioner's claims, none of the pretrial orders was destructive of Petitioners' case. None of the orders would be unreviewable after judgment:

(1) The affidavit which was filed in an attempt to disqualify the trial judge was insufficient under Hawaii law since adverse pretrial rulings cannot form the basis for disqualification. *Glover v. Fong*, 39 Hawaii 308, 316 (1952). No inadmissible "facts" were argued to the trial court during the pretrial motions. Furthermore, the affidavit did not, in and of itself, prevent the trial from proceeding. *McKeague v. Talbert*, 3 Hawaii App. 646, 652-655, 658 P.2d 898, 904-905 (1983); *State v. Iaea*, 55 Hawaii 80, 515 P.2d 219 (1973).

(2) Petitioners have also grossly exaggerated the order requiring the deposit of the payments due under the agreement of sale into court. Before the action began in March of 1982, Petitioners refused to make any further payments under the agreement of sale, and at the time of trial Petitioners owed Respondent Lane nearly $1,000,000 including the entire balance which fell due in January of

1983. Petitioners had also refused to relinquish possession of the house. If Respondent Lane had prevailed on the counterclaim for enforcement or if Petitioners had prevailed on their claim for specific performance, Petitioners would have had to pay at least $500,000 for the property even assuming offsets for any necessary repairs. Petitioners, however, were not residents of the United States, and there was no indication that they had substantial assets in the jurisdiction which could provide reasonable security that any judgment could be paid. Under the circumstances, the Circuit Court did not abuse its discretion in requiring the posting of reasonable security.

Moreover, this was not, as Petitioners characterize it, an "over-the-weekend" order. The motion was originally heard before the Circuit Court motions judge in September of 1984. An order was orally rendered on December 5, 1984. The amount was not specified in the order, but the parties were well aware of what the order meant.

Finally, and perhaps most importantly, the record is clear that the trial judge neither enforced nor threatened to enforce this order prior to trial. *See* P.A. L-24, lines 13-16 and p.M-9, lines 1 through 24.

(3) Petitioners' argument that the alleged "preclusion order" was destructive of their case is also contradicted by the record. First, the ICA correctly realized that Petitioners had failed to preserve an adequate record for review of the order. Opinion at 7, P.A. at A-8. There was no attempt to put on any evidence, nor was any required offer of proof made. *See* Haw. R. Evid. 103(a)(2).

Second, Petitioners had at least 39 other fact and expert witnesses remaining to testify as to the elements of their various claims. For example, Petitioners could have prevailed on their count for rescission by proving a material breach of the agreement of sale through Petitioners' numerous fact witnesses: for example, Frappia, Spivak, Barwick, Thursby, the Vilorias, Queriones and Petitioners themselves.[5]

Petitioners could have proved special damages through two other experts, Norman Lacayo and Dennis Shiu. Mr. Lacayo was an architect and had performed an inspection of the property soon after the alleged damages occurred. Shiu, Smith, Gray, Iida and Nakagawa all had engineering backgrounds and were listed to testify. Dr. Lum was available to testify as to general damages.

As to claims of misrepresentation, Petitioners themselves were listed to testify, as well as Spivak, Barwick, Coleman, Respondent Lane, and Respondent Lane's children. Finally, as to breach of duty by Respondents Sinsabaugh and Waterfront Properties, Inc., Petitioners had their real estate expert witnesses.

This cursory review of the pretrial pleadings directly contradicts Petitioners' contention that the preclusion order completely destroyed their case. Attorney Gibson's statement that Lipman's architect report was the "guts" of the case may have indicated his recognition that the architect's report was a significant factor, but it is by no means a concession that it was essential.

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5 See R.A. at B, and Record ("R") at Vol. IX at 43-75, Petitioners' Pretrial Statement.

There is no unfairness in a rule which requires a party to follow the proper procedure, regardless of adverse evidentiary and pretrial rulings, especially where proof on the essential elements of the case was still intact. There is thus no reason for this Court to review the pretrial rulings as destructive of Petitioners' case.

D. THE DECISION OF THE HAWAII INTERMEDIATE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Neither *Hammond Packing Co. v. Arkansas*, 21 U.S. 322 (1908), *Societe International Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958) nor any other case cited by Petitioners is inconsistent with the holding of the ICA. The cases cited by Petitioners do not involve comparable factual situations. These cases address the issue of the courts' discretion to impose discovery sanctions and expressly recognize that a court has the power to render orders such as those at issue here. *See, e.g. Link v. Wabash*, 317 U.S. 626. Petitioners have consistently failed to address the key issue presented by this case—whether the trial court abused its discretion in dismissing this case with prejudice when the Petitioners contumaciously refused to proceed on the morning of trial.

E. THE DECISION OF THE HAWAII INTERMEDIATE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THE FEDERAL COURTS OF APPEALS.

1. Third Circuit

Contrary to the Petitioners' contentions, the decision of the ICA is properly based on the decision of the Third Circuit in *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974).

Petitioners' attempt to distinguish *Marshall* is wholly inaccurate. *See* Six Points in Petition at pp. 30-31. First, contrary to Petitioners' characterization of the case, the Third Circuit Court of Appeals expressly refused to reach the merits of the question as to whether the district court correctly decided the issue of jurisdiction over the other witnesses. Second, the court never reached the question as to the need for the witnesses; in fact, in *Marshall,* as here, the petitioner claimed that the witnesses were "essential." *Marshall,* 492 F.2d at 918. Third, there is no indication in *Marshall* as to the expected length of the trial.

Fourth, the *Marshall* opinion does not state that findings and conclusions were made as to the preclusion order. Fifth, the Third Circuit Court of Appeals expressly refused to consider the preclusion orders, contrary to Petitioners' statement. Sixth, the *Marshall* trial court's consideration of lesser sanctions was never discussed, and Petitioners' conjecture as to what was in the record is entirely inappropriate.

In short, there are no factual distinctions between the *Marshall* case and the instant case which prevent the ICA from following the Third Circuit's thoughtful rationale.

It must further be emphasized that contrary to Petitioners' assertion, *Marshall* has not been "abandoned" in its own jurisdiction by *Reif v. A.H. Robbins,* 90 F.R.D. 526 (E.D. Pa. 1981). *Reif* did not involve a dismissal for failure to prosecute where the plaintiff had wilfully refused to proceed with trial. Thus, the *Reif* court did not even discuss the specific holding of *Marshall.* The *Reif* court

simply cited *Marshall* for the general proposition that dismissal for failure to prosecute is "a harsh remedy and should be resorted to only in extreme cases." This is hardly a basis for claiming that the Third Circuit has abandoned *Marshall*.

Indeed, the Third Circuit expressly relied upon *Marshall* in deciding the subsequent case of *Sullivan v. Pacific Indemnity*, 566 F.2d 444 (3d Cir. 1977). In *Sullivan*, the trial court dismissed plaintiffs' claims when the plaintiffs refused to proceed to trial after the trial court denied its request for class certification. The Third Circuit dismissed the appeal, and held, in reliance on *Marshall*, that it would not review the pretrial ruling on the basis that it would not allow the plaintiff to circumvent the proper appellate processes.

2. Other Circuits

The ICA's decision is also consistent with *Hughley v. Eaton Corporation*, 572 F.2d 557 (6th Cir. 1978) and *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979) (quoting extensively from *Marshall*, *Sullivan*, and *Hughley*). Also as explained above, contrary to Petitioners' assertions the ICA decision does not conflict with the Ninth Circuit's decision in *Anderson v. Allstate Insurance Co.*, 630 F.2d 677 (9th Cir. 1980).

F. HAWAII'S CIVIL JUSTICE SYSTEM PROTECTS PETITIONERS' CONSTITUTIONAL RIGHTS.

The Petitioners' complaints concerning Hawaii's civil justice system are completely groundless. Petitioners were never denied the opportunity to present their case. When the Petitioners were faced with two adverse pretrial rulings, they deliberately disobeyed the trial court's order to

begin trial, intentionally waived their claims and improperly sought to appeal the interlocutory orders.

No "substantive justice" was sacrificed to the interest of court administration. The trial judge appointed to preside over this jury trial was not engaged in any conspiracy or administrative "railroading." The Hawaii Constitution expressly authorizes Judge Sasaki's assignment to hear this case below and no proper challenge has been made to this provision by Petitioners herein. *See* Hawaii Const. art. VI, sec. 2.

The arbitrary and capricious conduct at issue here was that of Petitioners themselves. Respondents respectfully urge this Court to deny the Petition herein, and respectfully assert their right to the protection of a further, legitimate state interest—that of protecting a defendant against continued uncertainty and undue delay in the vindication of his or her claims. *See Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977); *H.R. Livermore Corp. v. Aktiengesellschaft Gebruder*, 432 F.2d 689, 691 (D.C. Cir. 1970).

G. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS UNTIMELY SUBMITTED.

As a final matter, Respondents note that the Petition, originally submitted on August 17, 1987, was returned to Petitioner as out-of-time. *See* Supreme Court Rule 20.3. Respondents agree that the Supreme Court Clerk was correct in doing so, and the Petition should be dismissed as untimely filed.

This Court has held that a State appellate court's judgment is final for the purposes of Certiorari when the "record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication

is not subject to further review by a state court." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). United States Supreme Court Rule 20.4 emphasizes that this date is *not* the date of "the issuance of the mandate (or its equivalent under local practice)."

Under the Hawaii Rules of Appellate Procedure (H.R.A.P.), the "decision" of an appellate court is rendered at the time of the filing of its opinion, memorandum opinion, or order. The filing of the opinion or ruling by the ICA starts the time periods running for further review. *See* H.R.A.P. 31(e) and 40(a).

H.R.A.P. 41(a) expressly sets the date by which the decision of an appellate court becomes final:

> The timely filing for a Motion for Reconsideration shall stay the finality of the decision until the disposition of the Motion unless otherwise ordered by the Court. The timely filing of an Application for a Writ of Certiorari shall stay the finality of the decision unless otherwise ordered by the Supreme Court. *If the Application for a Writ is rejected, the decision shall be final as of the date of rejection.* (Emphasis added).

Thus, the decision of the ICA is final and not subject to reconsideration or alteration following the date of the denial of an Application for Writ of Certiorari. This express statement of finality thus distinguishes this case from *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299 at n.18 (1978) (decided under Minn. Rules Civ. App. Proc. 136.02, 140).

The subsequent judgment submitted pursuant to H.R.A.P. 41(b) cannot have the effect of altering, amending, or reopening the decision. Respondents assert that

this document neither orders nor adjudges any issue, and contains little more than a recital of the disposition of the lower court's ruling by the appellate court. In effect, it is the jurisdictional "mandate" under local practice and under Supreme Court Rule 20.4. *See* P.A. at Exhibits D. and E. This case is also, therefore, distinguishable from *Puget Sound Power & L. Co. v. King County*, 264 U.S. 22, 24-25 (1923) which was decided before the adoption of current Supreme Court Rule 20.4.

In *McCarthy v. Jaress*, — Haw. App. —, 711 P.2d 1315, 1318 at n.5 (1985), the ICA ruled that the entry of judgment and notice of entry of judgment revest jurisdiction over the merits of the case in the Hawaii Circuit Courts. In so ruling, the ICA compared the filing of a Federal District Court "Judgment", which starts the time from which appeals must be taken under the Federal Rules of Appellate Procedure, to the ICA's opinion, which starts the time running for further review under the H.R.A.P. By necessary implication, under the H.R.A.P. the "Final Judgment" is equivalent to the "mandate" issued by the Federal appellate courts.

The Petitioners' Application for Writ of Certiorari to the Hawaii Supreme Court in this case was denied on May 8, 1987. Petitioners' attempted submission of the Petition on August 17, 1987 was therefore out-of-time, and the original rejection of the Petition by the Office of the Clerk was correct.

Petitioners may argue that the judgment of the ICA is somehow "reopened" or amended by a subsequent granting of costs and attorneys' fees. Under H.R.A.P. 39, the

awarding of costs and fees does not reopen the judgment; rather, only an Amended Notice of Entry of Judgment is issued. Moreover, an award of costs and fees is predicated on the fact that the underlying claims involved in the suit have been finally decided in favor of the party seeking them. Therefore, the issue of costs and fees is collateral to and separate from the issues already finally decided. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1981); *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984).

Respondents therefore respectfully urge this Court to deny the instant Petition as being untimely submitted.

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VI.

CONCLUSION

Petitioners' utter disregard of the trial court's orders to begin trial, and their deliberate default on the morning of trial, properly resulted in the dismissal of the complaint with prejudice and the entry of default. For the above-stated reasons, Respondents respectfully request that the Petition for Certiorari be denied.

DATED this 20th day of October 1987 at Honolulu, Hawaii.

ASHFORD & WRISTON

WAYNE NASSER,
Counsel of Record
MICHAEL W. GIBSON
LORRIN B. HIRANO

Counsel for Respondent
Howard T. Lane

CASE & LYNCH

BRUCE C. BIGELOW,
Counsel of Record
WESLEY W. ICHIDA
CATHY A. LEE

Counsel for Respondents
Willis Sinsabaugh and
Waterfront Properties, Inc.

No. 87-472

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N. V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and THE FIDELITY STANDARD LIFE INSURANCE COMPANY,

Respondents.

—o—

APPENDIX

—o—

GARY VICTOR DUBIN 3181
Attorney at Law
Suite 800
345 Queen Street
Honolulu, Hawaii 96813
Telephone No. 537-2300

Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEON D. RICHARDSON, et al.,	) CIVIL NO. 70332
Plaintiffs,	) AFFIDAVIT OF PLAINTIFF LEON D. RICHARDSON
vs.	) DISQUALIFYING THE HONORABLE
HOWARD T. LANE, et al.,	) EDWIN Y. SASAKI
Defendants,	) PURSUANT TO SECTION 601-7(b)
and	) OF THE HAWAII REVISED STAT-
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	) UTES; COUNSEL'S CERTIFICATE OF GOOD FAITH; EXHIBITS 1 AND 2
Intervenor/ Defendant.	) Trial: January 21, 1985

AFFIDAVIT OF PLAINTIFF LEON D. RICHARDSON DISQUALIFYING THE HONORABLE EDWIN Y. SASAKI PURSUANT TO SECTION 601-7(b) OF THE HAWAII RREVISED STATUTES

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

LEON D. RICHARDSON, being first duly sworn on oath, deposes and says:

1. I am a Plaintiff in the above action. My wife and I came to Honolulu from Hong Kong a few days ago to meet with out [sic] trial counsel, Mr. Dubin, to prepare for the jury trial of this case commencing January 21, 1985.

2. This has been a long ordeal for both of us and we were most anxious to get the trial underway and to resolve this legal dispute with these Defendants at this time.

3. Following our arrival, our trial preparation has been completely interrupted by two events: the filing of two motions to dismiss by Defendant Lane, for hearing before Judge Edwin Y. Sasaki, who our counsel and we learned on January 15, 1985, had been designated as the trial judge for our trial.

4. My counsel, Mr. Dubin, has informed us that we will have a mixed trier of fact, that is, that some of the issues will be decided by the trial judge and some by the jury. We understand that the jury will be picked at random from the community. And naturally we have fully expected that this Court would appoint a trial judge who would be neutral at the trial and would go into the trial not having taken a stance against us.

5. Defendant Lane's motions to dismiss, however, coming before the trial but presented nevertheless to the "trial" judge, Judge Sasaki, have, my wife and I feel, made it impossible to get a fair and impartial trial before Judge Sasaki who we believe to be prejudiced and biased against us as a result of his having been called upon by Defendant Lane to hear and make rulings before trial on

some of the very same issues that will directly and indirectly have to be decided at trial according to the evidence presented at trial and not before, as we understand the law and common sense.

6. We are not lawyers. Mr. Dubin, in his Certificate of Good Faith which accompanies this Affidavit, provides the legal details of the manner that Judge Sasaki has, because of these two pretrial motions, lost, in our view, his objectivity and impartiality for serving as the trial judge.

7. In layman's terms, my wife and I have no confidence that we can get a fair trial with him now because his ruling on Defendant Lane's motions to dismiss, before the trial, show to us a bias against us. He has made his rulings without the benefit of a trial or what Mr. Dubin refers to as an "evidentiary hearing" and His Honor has shown, we deeply feel, a mental attitude bent on believing Defendant Lane and his counsel and not us. There is in our view simply no other explanation for his decisions against us.

8. We, of course, understand that we can appeal his decisions which we do not like. What makes him objectionable to us as our *trial* judge is that we feel that the trial judge should and must go into the trial without preconceived notions regarding the merits of the dispute. He should be controlled in his decision making by what transpires at the trial and the evidence presented there, and should not have already made up his mind against us and our legal position which his ruling this week clearly shows.

9. We feel that Defendant Lane's two motions to dismiss should have been heard by other than the trial

judge. Judge Sasaki in our view is now hopelessly contaminated by, for example, the nonevidential statements and misrepresentations made by Attorney Gibson to him in oral hearing which would never have been permitted before the trial judge, we assume, at trial. The fact that Judge Sasaki has ruled adversely to us based on such nonevidence makes us reasonably believe that he is disposed against us now, for we are at a loss otherwise to understand how he has ruled as he has done.

10. As our trial judge, we would have no way of now combatting the false images of us and the preconceived notions he has of us as a result of what Attorney Gibson has argued to him in pretrial motion practice. He obviously has opinions on the merits adverse to us which he has formed *before* trial and which he will unfairly bring with him to the trial. Since the key issue in this case is rescission and, as we have been told by Mr. Dubin, that issue is substantially decided by the trial judge, there is simply no way we can accept his judgment now since before trial he has ruled so harshly against us.

11. I have instructed my attorney to file this affidavit before trial commences Monday, January 21, 1985, at 9:30 a.m. My wife and I are entering our 70s. We are not in good health. The thought of having Judge Sasaki as the "impartial" trial judge for our case which we brought against these Defendants has caused us both great mental anguish. We want only an uncommitted trial judge who is impartial and who has not made up his mind

already on the same issues that are to be tried. We really do not understand why we would be denied this simple requirement of justice.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Leon D. Richardson
LEON D. RICHARDSON

Subscribed and sworn to before me
this 18th day of January 1985.

/s/ Scott Totan
Notary Public, State of Hawaii
My Commission Expires 4-23-88

GARY VICTOR DUBIN 3181
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Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEON D. RICHARDSON, et al.,	) CIVIL NO. 70332
Plaintiffs,	) PLAINTIFFS' SUPPLEMENTAL PRETRIAL
vs.	) STATEMENT
HOWARD T. LANE, et al.,	)
Defendants,	)
and	)
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	)
Intervenor/ Defendant.	)

PLAINTIFFS' SUPPLEMENTAL PRETRIAL STATEMENT

Come now Plaintiffs all, pursuant to Rule 12(a)(10) of the Rules of the Circuit Courts of the State of Hawaii, and hereby submit this Supplemental Pretrial Statement,

amending their Pretrial Statement filed May 23, 1984, as follows:

* * *

APPENDIX A [NEW]:

List of Fact Witnesses

1. Leon D. Richardson
2. Margie J. Richardson
3. Armel J. Frappia
4. Frederick Ross Spivak
5. Donna Barwick
6. Robert Thursby
7. Corazon Viloria
8. Marysia Coleman
9. Willis Sinsabaugh
10. Barbara Jean Okada
11. Howard Lane, Jr.
12. Gregory Lane
13. Judith Lane
14. Anne Lewis
15. Dave Lewis
16. Ted Chinn
17. Lee Grady
18. Howard Lane, Sr.
19. Ginger Sinsabaugh
20. Eugenio Queriones
21. Nancy Beckner
22. Sue Gross
23. Juan Viloria

24. Representative of Bishop Estate (John R Peterson or another)
25. Representative of Kaiser Development Company (Riley Smith or another)
26. Representative of Fireman's Fund Insurance (Sharon Takao or another)
27. Representative of Building Department, City and County of Honolulu
28. Rebuttal Witnesses as Required
29. Authenticating Witnesses as Required
30. Newly-Discovered Witnesses as Available

APPENDIX B [NEW]:

List of Expert Witnesses

1. Jack Lipman
2. Joseph A. Dobrowolski
3. Norman Lacayo
4. Denis T. Shiu
5. Russell L. Smith
6. Brian L. Gray
7. Edward Iida
8. Stephen B. K. Moon
9. Evelyn Hayase
10. Kwong Yen Lum, M.D.
11. Jerry Nakagawa
12. Helen Price
13. Steven Hidano
14. James Tamura
15. Paul Hirata